# Asia Commercial Finance (M) Bhd v Umas Sdn Bhd & Anor

HIGH COURT (SIBU) — SUIT NO 22–87 OF 1999
CLEMENT SKINNER J
14 OCTOBER 2000

***Civil Procedure*** *— Writ of summons — Application to strike out — Whether indorsement commanding second defendant to enter appearance ten days after service of writ invalid — Whether certificate issued by commisioner of oaths identifying two exhibits in plaintiff's affidavit contravenes O 41 r 11(2) of the Rules of the High Court 1980 — Whether the word 'dishonest' in para 5 of plaintiff's affidavit unfounded — Rules of the High Court 1980 O 12 r 4(b) & O 41 r 11(2)*

The second defendant made an application to set aside the writ of summons as well as the service thereof on him on the ground that the writ was invalid as it contained an indorsement commanding him to enter appearance within ten days after the service of the writ on him. The writ was issued out of the High Court Registry at Sibu and was served on the second defendant at his place of residence in Selangor. The second defendant contended that as he was resident in West Malaysia and the writ of summons was served on him in Selangor, the time limited for his appearance in accordance with O 12 r 4(b) of the Rules of the High Court 1980 ('the RHC') was 20 days. At the commencement of the hearing, the second defendant raised two preliminary objections to the affidavit affirmed on behalf of the plaintiff: (1) the certificate issued by the commissioner for oaths identified two exhibits annexed to the affidavit, contravening O 41 r 11(2) of the RHC which requires one certificate per exhibit; and (2) the word 'dishonest' used in para 5 of the affidavit was unfounded and should be struck out.

**Held**, dismissing the application:

(1) In interpreting the words of O 41 r 11(2) of the RHC the court should not put on them a construction that would lead to inconvenience or unreasonableness but instead interpret them to promote the general intent and purpose of the rules, ie the speedy and efficient administration of justice. To interpret O 41 r 11(2) of the RHC in the way the second defendant urged the court to would lead to inconvenience and unnecessary waste of time. There is no necessity to read the word 'any' as meaning 'each' and 'every' (see p 428D–F).

(2) From the facts of the case, it was quite plain that the imputation that the second defendant had engaged in dishonesty to achieve delay was baseless and indeed, in the circumstances, scandalous and quite irrelevant in the context of this application. Pursuant to O 41 of the RHC, the court ordered that the word 'dishonest' be deleted from para 5 of the affidavit (see p 429C).

(3) From the reading of O 12 r 4(b) of the RHC, in the case of a writ issued out of a High Court Registry in Sarawak and Sabah, what determines whether a defendant is to be allowed ten or 20 days to enter an appearance in an action is his place of residence in relation to the situation of the registry from which the writ was issued and not where, within Malaysia, that the writ is served. If the place of residence of the defendant is not within the Division or Residency in which is situated the registry out of which the writ of summons was issued, then the time limited for entering an appearance is 20 days (see p 429H–I).

(4) In the light of the uncontroverted evidence contained in the statutory return made in Form 49 of the RHC to the Registrar of Companies, the court found that the second defendant did have a place of residence within the Division in which the High Court Registry at Sibu is situated and accordingly the time limit of ten days within which the second defendant was commanded to enter appearance after service of the writ on him was correct. The writ was therefore not irregular or invalid as alleged by the second defendant (see p 430D–E).

(5) Once it was established that the second defendant did have a place of residence in Sibu, he was entitled to only ten days to enter an appearance notwithstanding that the writ was served on him in Selangor. The fact that the second defendant also resided in West Malaysia would not prevent the plaintiff from relying on the fact that the second defendant had a place of residence in Sibu too and therefore the plaintiff could avail itself of the provisions of O 12 r 4(b) of the RHC and give the second defendant ten days only to enter appearance (see p 431A–B).

[**Bahasa Malaysia summary**

Defendan kedua membuat satu permohonan untuk mengetepikan writ saman dan penyampaian ke atasnya berlandaskan alasan bahawa writ adalah tak sah kerana ia mengandungi suatu pengindorsan yang mengarahkannya supaya memasukkan kehadiran dalam tempoh sepuluh hari selepas penyampaian writ ke atasnya. Writ tersebut dikeluarkan dari Pejabat Daftar Mahkamah Tinggi di Sibu dan disampaikan ke atas defendan kedua di tempat kediamannya di Selangor. Defendan kedua berhujah bahawa memandangkan beliau bermastautin di Semenanjung Malaysia dan writ saman disampaikan kepadanya di Selangor, jangkamasa yang dihadkan untuk kehadirannya menurut A 12 k 4(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah 20 hari. Di permulaan pembicaraan, defendan kedua membangkitkan dua bantahan permulaan terhadap afidavit yang diikrarkan bagi pihak plaintif: (i) perakuan yang dikeluarkan oleh pesuruhjaya sumpah mengenal pasti dua ekshibit yang dilampirkan bersama afidavit tersebut, bercanggah dengan A 41 k 11(2) KMT yang menghendaki satu perakuan untuk setiap ekshibit;

dan (ii) perkataan 'dishonest' yang digunakan dalam perenggan 5 afidavit tersebut adalah tanpa asas dan seharusnya dibatalkan. A

**Diputuskan**, menolak permohonan tersebut:

(1) Dalam mentafsirkan perkataan-perkataan A 41 k 11(2) KMT mahkamah tidak harus meletakkan tafsiran yang akan membawa kepada kesusahan atau ketidakmunasabahan tetapi sebaliknya mentafsirkannya untuk menggalakkan hasrat dan matlamat am kaedah-kaedah tersebut, iaitu pentadbiran keadilan yang pantas dan cekap. Untuk mahkamah mentafsir A 41 k 11(2) KMT dalam cara yang diseru oleh penentang kedua akan membawa kepada kesusahan dan pembaziran masa. Tiada keperluan untuk membaca perkataan 'any' sebagai bermaksud 'each' dan 'every' (lihat ms 428D–F). B C

(2) Daripada fakta-fakta kes, adalah nyata bahawa tuduhan bahawa defendan kedua tidak jujur dan mencapai matlamat kelewatan adalah tanpa asas dan sememangnya, dalam keadaan demikian, menyusahkan dan sugguh tidak relevan dalam konteks permohonan ini. Menurut A 41 KMT, mahkamah memerintah supaya perkataan 'dishonest' dipadamkan daripada perenggan 5 afidavit tersebut (lihat ms 429C). D

(3) Daripada bacaan A 12 k 4(b) KMT, dalam kes writ yang dikeluarkan oleh Pejabat Daftar Mahkamah Tinggi di Sarawak and Sabah, apa yang menentukan sama ada seseorang defendan haruslah dibenarkan sepuluh atau 20 hari untuk memasukkan kehadiran dalam satu tindakan adalah tempat mastautin berkenaan dengan kedudukan pejabat daftar dari mana writ dikeluarkan dan bukannya tempat di mana, dalam Malaysia, writ disampaikan. Sekiranya tempat mastautin defendan tidak berada dalam Bahagian atau 'Residency' di mana terletaknya pejabat daftar dari mana writ saman dikeluarkan, maka masa yang dihadkan untuk memasukkan kehadiran adalah 20 hari (lihat ms 429H–I). E F

(4) Memandangkan keterangan yang tidak dicabar dalam jawapan statutori yang dibuat dalam Borang 49 KMT kepada Pendaftar Syarikat, mahkamah mendapati bahawa defendan kedua memang memiliki tempat kediaman di Bahagian dalam mana terletaknya Pejabat Daftar Mahkamah Tinggi di Sibu dan lantaran itu had masa selama sepuluh hari dalam tempoh mana defendan kedua diperintah memasukkan kehadiran selepas penyampaian writ kepadanya adalah betul. Maka writ tersebut bukanlah di luar aturan ataupun tidak sah sebagaimana yang didakwa oleh defendan kedua (lihat ms 430D–E). G H

(5) Sebaik sahaja ia dibuktikan bahawa defendan kedua memang bermastautin di Sibu, beliau hanya berhak menerima sepuluh hari untuk memasukkan kehadiran tanpa mempedulikan hakikat bahawa writ disampaikan kepadanya di Selangor. Hakikat bahawa I

defendan kedua juga menetap di Semenanjung Malaysia tidak akan menghalang plaintif daripada bergantung kepada hakikat bahawa defendan kedua bermastautin di Sibu juga dan oleh itu plaintif boleh menggunakan peruntukan-peruntukan A 12 k 4(b) KMT dan memberikan defendan kedua tempoh sepuluh hari sahaja untuk memasukkan kehadiran (lihat ms 431A–B).]

**Notes**

For cases on writ of summons, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 5016–5114.

**Cases referred to**

*Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge* [1970] 3 All ER 7 (refd)
*Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (refd)
*Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 121 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 12 r 4(b), O 41 r 11(2), Form 49

*Stephen Tiong* (*Tiong & Co*) for the plaintiff.
*Anthony Ting* (*Anthony Ting & Co*) for the second defendant.

**Clement Skinner J.** :

This is an application by the second defendant to set aside the writ of summons as well as the service thereof on him, the second defendant having entered a conditional appearance for that purpose. The grounds upon which the second defendant seeks to do so are firstly, the writ of summons is invalid as it bears an indorsement that commands the second defendant to enter an appearance within ten days after the service of the writ on him. It is the second defendant's contention that as he is resident in West Malaysia and the writ of summons was served on him in Selangor Darul Ehsan, the time limited for his appearance, in accordance with O 12 r 4(b) of the Rules of the High Court 1980 ('the RHC') is 20 days and as such, the writ should be set aside. Secondly, the purported service of the writ of summons is irregular and defective and therefore should be set aside *ex debito justitiae*.

At the commencement of the hearing, Mr Anthony Ting, counsel for the second defendant raised two preliminary objections to the affidavit affirmed on behalf of the plaintiff by one Ling Choing Diang on 16 February 2000 ('Ling's affidavit'). The first objection was that two exhibits marked as LCD1 and LCD2 respectively were annexed to Ling's affidavit. The commissioner for oaths before whom Ling's affidavit was affirmed has issued a certificate in which he identifies both the exhibits as those referred to in Ling's affidavit. Mr Ting has found it fit to object to the certificate identifying these exhibits. According to him, the certificate does not comply with O 41 r 11(2) of the RHC. That rule reads:

> Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn.

According to Mr Ting the above rule requires that there must be one certificate per exhibit; not more than one exhibit can be identified in one certificate. Relying on *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 which states that the rules of court must, prima facie, be obeyed, counsel urged me to expunge Ling's affidavit from the record or at the least not to refer to the exhibits therein, in which event, the averments in the second defendant's affidavit remain unrebutted and must be deemed to be admitted by the plaintiff. I regret I find this objection devoid of any merit. While I agree that, prima facie, the rules of court must be obeyed, it is equally important that we should understand the purpose of the rules and why they should be obeyed. In *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 121, Chang Min Tat J (as he then was) said:

> It should, I think, be realised by practitioners as well as judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

In interpreting the words of O 41 r 11(2) of the RHC, I should therefore be careful that I do not put on them a construction that would lead to inconvenience or unreasonableness but instead interpret them to promote the general intent and purpose of the rules, which, as stated by Chang Min Tat J, is the speedy and efficient administration of justice. To interpret O 41 r 11(2) of the RHC in the way Mr Ting would have me to, would in my view, lead to inconvenience because if there were, say, 50 exhibits annexed to an affidavit, the commissioner for oaths before whom the affidavit was affirmed would need to issue 50 certificates — an unnecessary waste of time and effort not only to the commissioner for oaths, but also to anyone else dealing with that affidavit, including the court, having to look for 50 certificates to identify those exhibits when one certificate will serve the same purpose. In my view, there is simply no necessity to read the word 'any' as meaning 'each' and 'every'. I accordingly reject the objection raised on this ground.

Mr Ting next objected to certain words used in para 5 of Ling's affidavit. The objection centres around the fact that when the first defendant was served with the writ herein, Messrs Anthony Ting & Co acted on their behalf in filing their defence, but when the solicitors for the plaintiff enquired from Mr Anthony Ting if his firm would accept service of process on behalf of the second defendant, Mr Anthony Ting informed them that he had no instructions to do so. Shortly thereafter, the plaintiff's solicitors received a telefax from the second defendant informing them that he was residing in Selangor Darul Ehsan, and would accept service at the address given in the telefax. The writ was accordingly served on the second defendant at Selangor Darul Ehsan, whereafter Messrs Anthony Ting & Co entered conditional appearance on behalf of the second defendant and thereafter made this application. In para 5 of his affidavit, Ling has labelled

the above moves by the second defendant as a 'dishonest tactic and strategy' deployed to achieve delay, the suggestion being that at all material times, Mr Ting had been acting on the instructions of the second defendant but had deliberately not given instructions to accept service so as to delay the proceedings. The second defendant is offended by the allegation of dishonesty. He complains that the allegation is totally unfounded and quite baseless and, in the circumstances, scandalous. It should be struck out. Mr Ting has affirmed an affidavit on 28 February 2000, in which he states on oath, that it would have been highly presumptuous of his firm to presume that they would be instructed to act for the second defendant simply because they had been appointed to act for the first defendant. Mr Ting states that it was only at a later date, namely 17 January 2000, that the second defendant instructed Mr Ting to act on his behalf in this suit. From the above, it is quite plain that the imputation that the second defendant had engaged in dishonesty to achieve delay is baseless and indeed, in the circumstances, scandalous and quite irrelevant in the context of this application. Pursuant to O 41 r 6 of the RHC, I order that the word 'dishonest' be deleted from para 5 of Ling's affidavit.

I now consider the merits of the second defendant's application to set aside the writ and service thereof on the grounds earlier stated. The way I see it, two issues arise for consideration here: (a) is the second defendant correct in his assertion that the writ should have been indorsed with a command that he enters an appearance within 20 days and not ten days as stated; and (b) if the answer to (a) is in the affirmative, should the writ be set aside for such irregularity?

To resolve the first issue, reference must be made to O 12 r 4(b) of the RHC which states that:

> 4 References in these rules to the time limited for appearing are references —
>
> (a) …
>
> (b) in the case of a writ served within Sarawak or Sabah, to 10 days after service of the writ (including the day of service) or in the case of a defendant whose place of residence or if an incorporated society whose registered office of business is not within the Division or Residency in which is situated the Registry out of which the writ of summons was issued, 20 days after service of the writ (including the day of service);
>
> (c) ……

It will be seen from a reading of sub-rule (b) above that in the case of a writ issued out of a High Court Registry in Sarawak and Sabah, what determines whether a defendant is to be allowed ten or 20 days to enter an appearance in an action is his place of residence in relation to the situation of the registry from which the writ was issued and not where, within Malaysia, that writ is served. If the place of residence of the defendant is not within the division or residency in which the registry out of which the writ of summons was issued is situated, then the time limited for entering an appearance is 20 days. The writ in this case was issued out of the High Court registry at

Sibu. The question is, has the second defendant a place of residence within the Sibu division? A

The writ herein was issued out on 22 November 1999. The addresses of both the first defendant and the second defendant given in the writ are 2A, 2nd Floor, Brooke Drive, 96000 Sibu, Sarawak. The plaintiff has through Ling's affidavit, explained that that was the address given in the guarantee on which the second defendant is now being sued and it was intended to serve the writ on him in Sibu. Though the address of the second defendant stated in the writ does not appear to be his residential address in Sibu, the plaintiff has exhibited a copy of a statutory return made in Form 49 by the first defendant, Umas Sdn Bhd to the registrar of companies, giving particulars of its directors. In that form, which is dated 22 December 1999, it is stated that the second defendant's residential address is 25, Upper Lanang Road, 96000 Sibu, Sarawak, which is a place within the Sibu division. B C

The second defendant has, in an affidavit affirmed on 28 January 2000 in support of this application, stated that at all material times, he was resident in West Malaysia with a residential address at 2109 Block E, Riana Green Condominium, Jalan Tropicana Utara, 47410 Tropicana, Petaling Jaya, Selangor Darul Ehsan. It must be noted, however, that the second defendant has not denied that he has a place of residence at 25, Upper Lanang Road, 96000 Sibu. In the light of the uncontroverted evidence contained in a public document, namely, the statutory return made in Form 49 to the registrar of companies, I find that the second defendant did have a place of residence within the division in which the High Court Registry at Sibu is situated, and accordingly, the time limit of ten days within which the second defendant was commanded to enter an appearance after service of the writ on him was correct. The writ was therefore not irregular or invalid as alleged by the second defendant. D E F

When the second defendant came to know that a writ had been issued against him, he wrote to the plaintiff's solicitors informing them that he was residing in West Malaysia with an address at Selangor Darul Ehsan and that he would be available at that address for service of the writ upon him. In response to that letter, the plaintiff's solicitors caused the writ to be so served on the second defendant at that address in Selangor Darul Ehsan. As a result of such service, it is now the contention of the second defendant that the plaintiff, in having intentionally and knowingly elected to effect service on the second defendant in West Malaysia, should have taken steps to amend the writ to state that the time limited for appearance was 20 days instead of the stated ten days, and in not having done so, both the writ and the service thereof are irregular, invalid, defective and should be set aside. The question is, once the plaintiff became aware that the second defendant was residing in West Malaysia and had decided to serve the writ on him there, was there a need to give the second defendant 20 days to enter an appearance as claimed? G H I

In my judgment, there was no need to. As I have already said, in the case of a writ issued out of a High Court Registry in Sarawak and Sabah,

what determines whether a person is to be allowed 20 days to enter an appearance is his place of residence in relation to the situation of the registry out of which the writ is issued, and not where, within Malaysia, that writ is served on a defendant. Thus, once it is established that the second defendant did have a place of residence in Sibu, he was only entitled to ten days to enter an appearance, notwithstanding that the writ was served on him in Selangor Darul Ehsan. The fact that the second defendant also resides in West Malaysia would not, in my view, prevent the plaintiff from relying on the fact that the second defendant has a place of residence in Sibu too and therefore the plaintiff can avail itself of the provisions of O 12 r 4(b) of the RHC and give the second defendant ten days only to enter an appearance as there are authorities which show that the courts recognize that a person may have a place of residence in more than one place. See, for example, the dictum of Lord Denning MR in *Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge* [1970] 3 All ER 7 at pp 11–12, where in discussing whether two students, at the Universities of Bristol and Cambridge respectively, were entitled to be registered on the register of electors for their university towns, since they were not resident there on a certain qualifying date, his Lordship said:

> … a man can have two residences. He can have a flat in London and a house in the country. He is resident in both … I do not think these students are disqualified simply because their parental home is England. They may be resident at their homes, but they may also be resident in Bristol or Cambridge …

It was further contended on behalf of the second defendant that in consciously electing to effect service of the writ on the second defendant in Selangor Darul Ehsan, the plaintiff cannot now turn around and rely on the fact that as the Form 49 disclosed that the second defendant had a place of residence in Sibu, ten days was the correct time limit for the second defendant to enter an appearance. In support of this contention, counsel for the second defendant quoted the following passage from *Halsbury's Laws of England*, Vol 16 (4th Ed) at para 1508 which reads:

> If a man is entitled to one of two inconsistent rights as opposed to having a choice between two alternative remedies, and, with full knowledge, he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other.

My answer to this contention is that it would have merited consideration if, in the case of writ issued in Sarawak and Sabah, the place at which that writ was served determines whether a defendant is to be given ten or 20 days to enter an appearance; because then, it could be said that in deciding where to serve the writ, that decision could involve the plaintiff in having to choose between allowing a defendant ten or 20 days to enter an appearance. However, as I had been at some pains to explain earlier, in the case of a writ issued out of a High Court Registry in Sarawak and Sabah, the place where that writ is served does not determine the time limited for appearing thereto — the place of residence of the defendant in relation to the registry out of which the writ is issued does. That being the case, the decision to serve the

writ herein on the second defendant in Selangor Darul Ehsan did not involve the plaintiff in having to choose between two inconsistent rights as alleged.

Accordingly, there is no reason to set aside the writ and service thereof. Neither the writ nor the service thereof was irregular or invalid.

For the reasons given above, I dismiss the second defendant's application with costs. Counsel for both parties had earlier informed me that the matters raised in this application have also been raised in similar applications filed in ten other suits between the same parties. Those suits are 22–88–99, 22–89–99, 22–90–99, 22–91–99, 22–92–99, 22–93–99, 22–94-99, 22–95–99, 22–96–99 and 22–99–99. Counsel for both parties had agreed that this decision would bind them in the aforementioned suits.

*Application dismissed.*

Reported by Jafisah Jaafar